dishonesty the falsehood of the testimony is detected and deceives none.

"Absolutely to exclude an interested witness is, therefore, as unsound in theory as it is inconsistent in practice. It is inconsistent, because the law admits witnesses far more likely to be biassed in favor of the party than he who has merely a pecuniary interest. A father may testify for his son; a child living with his father, and dependent upon his bounty, may appear as his witness, nay, as his only witness, without question. Is the immediate gain of a dollar, by the result of a cause, so potent to outweigh integrity, while affection, consanguinity, dependence, are put down as dust in the balance? There is not another rule in the law of evidence so prolific of disputes, uncertainties, and delays, as that we are considering. Not a circuit is held, but question after question is raised upon it; nor a term where exceptions growing out of it are not debated. Some of the foregoing reasons apply also to the exclusion of a person sentenced for felony. It is wiser, we cannot doubt, to place the witness on the stand and let the jury judge of his testimony." 1 Phil. Evid. pp. 25–26, note. J. A. J.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

JAMES B. THAYER, ADMINISTRATOR, *vs.* W. W. WELLINGTON *et al.*

A will duly attested, giving a certain sum of money to T. and W. in trust, "to appropriate the same in such manner as I may, by any instrument in writing, under my hand, direct and appoint," and an appointment by a separate paper, signed by the testator, but not duly attested, declaring the appropriation and naming the beneficiary, does not create a valid bequest in favor of the person thus declared and appointed by the unattested instrument.

This case was heard before the full court, upon bill, answers, and evidence. The facts will sufficiently appear in the opinion delivered by the court.

B. R. Curtis and *C. T. Russell*, for the city of Cambridge.

A. H. Fiske and *H. G. Parker*, for residuary devisees.

J. B. Thayer, pro se.

DEWEY, J.—The present bill is filed by the administrator *with the will annexed*, of the estate of the late Edmund T. Dana, who asks the direction of this Court as to his duty in the execution of his trust as to the payment of any money in discharge of a certain provision in the last will and testament of said Dana, being clause No. 23, and is in the words following: "I give to Edmund T. Hastings and to William W. Wellington, and to the survivor of them, fifteen thousand dollars in trust, to appropriate the same in such manner as I may by any instrument in writing under my hand direct and appoint."

The testator, by a separate instrument bearing on its face the same date as the will, but not attested by any witness, or shown to have been executed in the presence of any, or to have been signed on the same day except as by the date written thereon, did direct and appoint as follows:—

"*To Edmund T. Hastings and William W. Wellington, or whosoever else may execute the trust created by the twenty-third clause of my Will.*

"The sum of fifteen thousand dollars, bequeathed by the said twenty-third clause, is to be paid over, if and whenever my trustees or trustee shall deem it expedient to do so, to the City of Cambridge, to be held by the said city in trust, as an entire fund, the income thereof to be appropriated annually, for ever, to the increase and support of the library of the Cambridge Athenæum; provided, however, that, if and whenever my said trustees or trustee shall be of opinion that it is not expedient that the said sum of fifteen thousand dollars should be so appropriated, the same to be paid over to my heirs at law; and provided, further, that the said capital sum be paid over, either to said City of Cambridge or to my heirs at law, within three years from my decease. "EDM. T. DANA.

"Cambridge, March 10, 1858."

This paper it is alleged was placed by said Dana in the hands of said Edmund T. Hastings, but at what time does not appear. The trustees have in writing signified their intention to pay said sum to the City of Cambridge. On the part of the residuary legatees, it is contended that by 23d clause in the will, nothing passed to the City of Cambridge, the same not being named as legatee, and it not being competent for a testator by a duly executed will, to create for himself a power to dispose of his estate to legatees by another instrument not duly executed as a will or codicil.

The power of transmission of property by will is a power solely to be executed under our statute law. The legislative authority has seen fit to regulate the exercise of this power by precise and clear provisions. By those provisions, as found in Rev. Stat. ch. 62, § 6, and Gen. Stat. ch. 90, § 6, it is declared "that no will (except nuncupative wills) shall be effectual to pass any estate real or personal, nor to change or in any way to affect the same, unless it be in writing and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by three or more competent witnesses." These provisions are express in their terms and prescribe a rule from which this Court cannot depart, although its application in particular cases may defeat the giving effect to the actual purpose of a party as to the disposition of his property. The practical benefits of such provision have been fully acknowledged by the long continuance of statutes requiring them as to devises of real estate, and the general extension of them at a late period to wills devising personal estate.

A similar view of this subject prevails in England, where, by the stat. 1 Vict. ch. 26, designed and effectually framed to make the provisions regarding a certain number of witnesses to a will, to be in effect one that should actually embrace all cases of bequests claimed under a will, and exclude all reservation of power on the part of the testator to extend the provisions of a will by an instrument not executed as required by the Statute of Wills.

It is true that the provisions of that statute are somewhat broader than those of Massachusetts, and it is by the latter that the present case is to be adjudicated. But we think that under a similar statute to that which has existed here since Rev. Stat. c. 62, § 6 (1836), requiring an attestation, by three witnesses, of the execution of wills of personal estate and real estate, the English courts would not have sustained a provision in a will that the particular beneficiary may be declared by the testator in a subsequent and independent instrument not executed in the form prescribed by said statute. While the law permitted legacies of personal property to be given without any attestation of witnesses, and by loose and informal papers, the courts were disposed to give effect to a bequest of personal property by an instrument not duly attested as a will, notwithstanding the exist-

ence of a will previously made and executed in conformity to the statute. But under the statute requiring a similar form of attestation by three witnesses, in cases of personal bequests as well as devises of real estate, no case has occurred in which we have sanctioned any departure from the requirement that all bequests must be made by a will duly attested by witnesses.

The statute of 1 Vict. ch. 26 has put an end in England to all further attempts by a testator to create, by an attested will, a power to charge by a separate instrument not duly attested, legacies upon his estate. 1 Jarman on Wills 147. As already remarked, it will be found that prior to that statute it had been held that where, by a will duly attested, the testator had charged his lands with the payment of debts and legacies, that is, where a devise of land was made to devisees subject to payment of legacies, a personal bequest given by instrument not duly attested according to the statute, was a valid legacy, and chargeable upon the estate. In view of this state of the law, it was urged that, under this course of decisions, it would follow that a person might, by means of a will duly executed, secure to himself, by a provision in such will, the power to make a further disposition of his lands by a written instrument not duly attested as a will, declaring the devisees. To this it was answered, "if a man might, by a will duly attested, devise his lands upon such trust as he should appoint by any other instrument, it would in effect amount to a repeal of the statute in respect to the solemnities of testamentary disposition of lands. A man would have nothing to do on his coming of age but to devise his whole real estate to some nominal person upon such trust as the testator should in writing hereafter appoint, and thus he might at any time thereafter make a testamentary disposition of his estate without conformity to the ceremonies required by the statute." Fearne's Opinion 425; 6 Cruise Dig. 66, Greenlf. Ed.

The view thus stated, denying that any authority could be reserved by the testator to declare and create new devisees by an unattested instrument when the devise was one within the statute, was sustained by *Habergham* vs. *Vincent*, 5 T. R. 92, and the same case in 2 Vesey Jr. 204, and in *Rose* vs. *Cunyngame*, 12 Vesey 29; *Johnson* vs. *Ball*, 5 De Gex & S. 85.

In Washburn on Real Property, 2 Vol. 693, the rule upon this subject is stated to be that a testator cannot by his will reserve a power to dispose of an estate at a future time by an

instrument not executed as required by the Statute of Wills, so as to take effect under his will. The doctrine of the New York courts is to the like effect. In *Langden* vs. *Aster*, 3 Duer 477, it was said by DUER, J., "a testator cannot by his will confer on himself, prospectively, the power of altering or revoking, by an unattested will, any of the provisions in his will." The ruling was equally strong as held by the Court of Appeals in the same case. 16 New York Reports 22. In *Thompson* vs. *Quinby*, 2 Bradford, 1 New York Surrogate Cases, it was held, "that a will cannot reserve a power to give by an instrument not executed as a will."

We find no authority in any decisions of this court for sustaining a bequest made under such reserved power of future declaration by the testator, as to the nature of the legacy, and the person for whose benefit it is given, and we cannot but feel that the holding a devise or bequest thus created to be a legal devise, would be in direct contradiction, both to the letter of the statute and the purposes intended to be secured by its enactment. Unless we refuse to sanction a bequest of this character, the statute becomes a dead letter as to all who choose to disregard it, and legacies may be given to the whole amount of the estate without any indication on the face of the will who are the legatees, or what amount individual persons are to receive, or whether the estate is given to those who are allied to the testator by blood, or to strangers, or devoted to some public charity. It would only be necessary to make a mere naked devise to some individual duly attested by three witnesses, "to hold the same wholly in trust for such persons as the testator may hereafter direct and appoint," and then by an instrument not executed in the presence of witnesses, the testator may create his legatees as his future purposes might suggest.

The language of this court in *Tucker* vs. *Seamen's Aid Society*, 7 Met. 204, was, "the law requires a will to be executed in the presence of three witnesses, and with other solemnities calculated to insure correctness, and guard against mistake and imposition, and without this precaution every act and instrument purporting to give property, real or personal, by will, is inoperative and void."

We are constrained by the statute, and by the course of judicial decisions upon statutes of like character, from giving effect to a legacy declared and given to a legatee by an instrument not duly attested as a testamentary disposition of property. The

result is, therefore, that the instrument signed by Edmund T. Dana, declaring that the sum of $15,000 bequeathed by 23d clause of his will, is to be paid over, if and whenever his trustees shall deem it expedient to do so, to the City of Cambridge, to be held by the same city on certain trusts stated, does not operate to create a valid devise in favor of the City of Cambridge, and cannot be enforced as such.

The view thus taken of the present case does not exclude in all cases a reference to other documents or instruments for the purpose of giving effect to a will. A testator may refer expressly to a paper already executed, and described with such particularity, as to incorporate it virtually in the will, as he may refer to deeds and other instruments, or monuments or existing facts, to which reference may be had, in construing his will. *Habergham* vs. *Vincent*, 2 Vesey 220; *Smart* vs. *Priejan*, 6 Vesey 560; *Wilbar* vs. *Smith*, 6 Allen 194; *Loring* vs. *Sumner*, 23 Pick. 98; *Longstaff* vs. *Rennisor*, 1 Drew. 28; *Tonnele* vs. *Hall*, 4 Comst. 140.

The distinction is a very obvious one. In the case last stated, the purpose of the testator as to this particular legatee, and the character of the legacy, is fully settled. Such reference leaves nothing ambulatory, and excludes the idea of an unsettled purpose, and a design to leave anything open as to the person who shall be the legatee. But if his purpose is not definitely settled at the time of executing his will, but is to be fashioned and moulded by future events that may affect his mind, such future determination to make one a legatee cannot be allowed to have any legal effect, unless by the execution of a codicil or a subsequent will executed in accordance with the legal requirements of a testamentary instrument.

It is further urged that although the instrument signed by Mr. Dana, directing the appropriation and naming the City of Cambridge as the beneficiary, is defective as a will or codicil, by reason of its not being duly attested, yet this court may sustain the intended legacy, it being given to a charitable use and to be dealt with as a public charity.

No doubt a court of equity will deal liberally with a public charity. It will do so in supplying the want of a proper trustee, and in aiding the defective execution of a power of appointment and the uncertainty arising from the generality of the description of the beneficiaries. But the difficulty in the present case is that no public charity is established or shown to exist under the

will of Mr. Dana. You have nothing whereon to raise the slightest presumption of a public charity. The clause in the will declared a mere naked trust of a sum of money which the testator reserved the right to appropriate in such a manner as he might subsequently direct and appoint. It was as competent, under this provision, to have appropriated it to any one of his kindred as to the City of Cambridge. It is only by recurring to the instrument not duly attested that you find any allusion to a public charity, or that the City of Cambridge was to be a beneficiary. The difficulty here lies too deep to be removed even by a court of equity. It is the absence of any legal instrument creating a public charity, and not a defective execution of a power of appointment that has been legally authorized by a will. Nor can we adopt the suggestion made in behalf of the City of Cambridge, that effect may be given to the supposed purposes of this charity by holding this bequest to be an absolute one by the testator of a sum of money to Hastings and Wellington personally, in the confidence that they would appropriate it as he should thereafter direct. As an absolute legacy to the persons named, to be disposed of as they might elect, or appropriate it as in their judgments might be most useful, the words of this clause do not authorize that effect to be given to it. The fifteen thousand dollars were given to them in trust, "to appropriate the same in such manner as I may by any instrument in writing under my hand direct and appoint." It was not the intention of the testator under that clause in the will, to make any present appropriation of the sum named therein or to clothe the trustees with power to do so.

In the opinion of the court, the 23d clause in this will, with the unattested instrument signed by said Dana, declaring the appropriation of the said sum of fifteen thousand dollars to the City of Cambridge, and the assent of said Hastings and Wellington to the payment of the same, do not create a valid bequest to the City of Cambridge.

By the courtesy of Mr. Justice DEWEY, we have been enabled to give to the profession the foregoing very able and satisfactory opinion of the Supreme Judicial Court of Massachusetts at an earlier day than it would otherwise become accessible to them. The grounds upon which the case rests are so entirely unquestionable, and are so universally recognised at the present day, that we should not be expected to add anything upon the leading point decided in the case. We have discussed the subject at length in Redfield on Wills 271, 279, where numerous cases bearing upon the point are referred to.

No inference should be made from any incidental statements in the above opinion against the general validity of testamentary powers, whereby the will

may be so expressed as not to disclose either the persons to be benefited, or the proportions in which the ultimate donees are to take. Nothing is more unquestionable than the right of the testator to create general power of appointments in regard to all or any of his estate; thus leaving the ultimate destination of the same solely and exclusively in the discretion of another. The result of such a course will be, that the appointee will have his whole life in which to make the appointment, failing of which, the property will go to those entitled to the residue; or as in case of intestacy, as the case may be. This point is considerably discussed in the case of Gibbs *vs.* Rumsey, 2 Vesey & B. 294. The principle of this last case seems to be that where the gift implies no object at all, but merely that the donee shall dispose of it, the gift is treated as absolute in such donee, at least during life, with the power to dispose of it at his own absolute discretion, at any time during his life. In a very late English case, Fenton *vs.* Hawkins, 9 Weekly Reporter 300, where the devise was to three persons, as tenants in common, subject to any disposition the testator might thereafter make, by deed or writing duly executed, and none being made, it was held the donees took an absolute interest. Redfield on Wills 699.

The result of the English cases seems to be, that where there is manifested on the face of the will a purpose of controlling the action of the donee, in regard to the ultimate disposition of the estate, the bequest is to be regarded in the nature of a trust. Wright *vs.* Atkins, 1 T. & Russ. 143. And in all cases of trust, by which, in courts of equity, is meant, where the appointee is absolutely *required* to dispose of the estate in a particular manner, either directed in the will or by the courts; the mode of such disposition must be so described in the will, that courts may be able to enforce it, and for that purpose to determine when the trustee has or has not discharged his duty.

But in all cases of appointment, where the first donee is left to his own absolute will and desire, although it may be fair to presume the testator expected such donee to make some disposition of the estate and not absolutely to retain it himself; still if no limitation is prescribed in the will, the English courts have in some well considered cases held, that the donee has his whole life in which to make such disposition, and that any application during his life, on the part of the heir or next of kin, to the courts, to compel such appointment, will be premature, inasmuch as the donee has by the terms of the gift an *unlimited time* in which to make his appointment, and no court can say he is in default during his life. See opinion of Court in Gibbs *vs.* Rumsey, supra. And from the case of Fenton *vs.* Hawkins, supra, it would seem questionable how far the heirs or next of kin could interfere and interpose any valid claim, even after the decease of the donee, with the power of appointment unexecuted. But that question seems not settled.

But, as is well said by the learned judge in the principal case, there must be some present purpose expressed in the will to make the final disposition of the estate, or to clothe the donees "with the power to do so," or the provision is wholly inoperative in any view. And viewed as a trust merely, in contradistinction to a power of appointment, the provisions of the will must be certain, or else, in the language of the courts, susceptible of being reduced to certainty. By this is commonly understood, that in all trusts, both the subject of the gift and the object, or beneficiaries, must be so described, that they are capable of being ascertained by the court. This is a nice and very difficult question, which we have no time or space here to discuss.

I. F. R.